

3-10-2015

# Kantor v. Kantor Respondent's Brief Dckt. 41946

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IN THE SUPREME COURT OF THE STATE OF IDAHO

ROBERT ARON KANTOR, )  
)  
Plaintiff/Respondent/ )  
Cross-Appellant, )  
)  
vs. )  
)  
SONDRA LOUISE KANTOR, )  
)  
Defendant/Appellant. )  
\_\_\_\_\_ )

DOCKET NO.: 41946

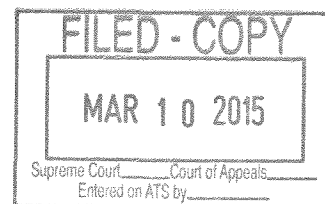
**RESPONDENT/CROSS-  
APPELLANT'S BRIEF**

Appeal from the District Court of the Fifth Judicial District for Blaine County  
Honorable Robert J. Elgee, District Judge, presiding.

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RESPONDENT/CROSS-APPELLANT'S BRIEF - 1



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### III.

#### STATEMENT OF CASE

##### a. NATURE OF THE CASE

This case involves the District Court's use of its authority to dismiss a party's Counterclaim as a means of enforcing the District Court's Orders and as a means of sanctioning the bad faith actions of a party who sought to frustrate a stipulation that was accepted by the District Court and incorporated into an Order of the District Court.

##### b. FACTS

Appellant (Sondra) and Respondent/Cross-Appellant (Robert) were divorced pursuant to a Judgment and Decree of Divorce entered on April 30, 2012. R., Vol. 1, p. 26 - 27. Sondra and Robert resolved their property and debt issues by way of a Property Settlement Agreement (PSA) and by mutual agreement the PSA was not incorporated into or merged into the Decree of Divorce. R., Vol. 1, p. 28 - 51.

This case was far more than just a breach of contract action as claimed by Sondra. Robert's Complaint was filed on October 11, 2012 at 9:20 a.m. R., Vol. 1, p. 13. Sondra's divorce attorney (Stan Welsh) was contacted by Robert's attorney on October 10th and was told that Robert was filing an action seeking injunctive relief. R., Vol. 1, p. 66-67. Robert initially sought monetary damages and injunctive relief related to Sondra's failure to abide by the terms of the PSA and another agreement entered into by the parties with respect to the community home located at 265 Golden

Eagle Drive, Hailey, Idaho (Golden Eagle Drive). R., Vol. 1, p. 13 - 20. The scope of the case broadened significantly with the filing of Sondra's Answer and Counterclaim on November 21, 2012, which sought an accounting related to the parties' assets, and monetary damages for Robert's alleged breach of contract and alleged fraud. R., Vol. 1, p. 76 - 86.

The District Court entered summary judgment dismissing Sondra's breach of contract and fraud claims, and it also granted summary judgment on behalf of Robert on his claim that Sondra was obligated to sign a contract extension related to the sale of Golden Eagle Drive. R., Vol. 2, p. 454 -455.

After the summary judgment was entered, Sondra was granted leave to file an Amended Answer and Counterclaim. R., Vol. 3, p. 558 - 559. In her Amended Answer and Counterclaim which was filed on August 9, 2013, Sondra alleged that she had been damaged by Robert's attempt to obtain a loan modification with Bank of America who held a security interest in Golden Eagle Drive as a result of a loan executed by the parties. R., Vol. 3, p. 560 - 574. Sondra's prayer sought injunctive relief preventing Robert from pursuing the loan modification.

Sondra filed a Motion for Preliminary Injunction seeking an Order enjoining Robert from pursuing the loan modification and requiring Robert to cooperate fully with a short sale of Golden Eagle Drive. R., Vol. 3, p. 575 - 576. Robert also filed a Motion seeking injunctive relief that would enjoin Sondra from contacting Bank of America regarding the current financing of Golden Eagle Drive. R., Vol. 3, p. 600 - 601.

The District Court held an evidentiary hearing on both parties' motions for injunctive relief on September 12, 2013. The hearing ended with a stipulation that was placed on the record and accepted by the District Court. Tr., Vol. 1, p. 173 - 178. The stipulation provided that the Motions for Preliminary Injunction were withdrawn and Robert was given the authority to pursue a loan modification with Bank of America. The parties agreed Sondra would not pursue a short sale between the time of the stipulation and trial. Robert was required to provide Sondra notice of his contact with Bank of America, and any recordings or memos of his discussions with Bank of America. The stipulation prohibited Sondra and her representatives from contacting Bank of America about the loan modification or the short sale process. Id. The District Court questioned Robert and Sondra about their understanding of the agreement and their willingness to be bound by the stipulation. Robert and Sondra both told the District Court that they understood the terms of the agreement and they agreed they would abide by the stipulation whereupon the Court accepted the stipulation. Tr., Vol. 1, p. 176 - 177.

On October 9, 2013, Robert filed a Motion to Compel Recording of Quitclaim Deed. R., Vol. 3, p. 653 - 654. Robert's Motion was supported by his Affidavit wherein Robert explained that he needed Sondra to execute a quitclaim deed to Robert (subject to Sondra's 50% interest) because Bank of America was requesting this document before it would proceed with the loan modification. R., Vol. 3, p. 655 - 658. Robert also noted that paragraph 28 of the PSA required Sondra's cooperation in the event Robert obtained refinancing of any debt that Sondra was liable on. R., Vol.



3, p. 656, ¶ 2. Paragraph 28 of the PSA reads in part: “In the event Robert shall obtain refinancing of any debts for which Sondra has liability, Sondra shall co-operate in **any manner** needed to conclude such refinancing after review of the refinancing documents and terms by her attorney and/or accountant.” R., Vol. 1, p. 40, ¶ 28, emphasis added. Robert’s Motion and supporting Affidavit were faxed to Sondra’s counsel on October 9th. R., Vol. 3, p. 654, 658. Robert’s Affidavit stated that the only document needed by Bank of America to complete their loan modification review was a quitclaim deed from Sondra to Robert. R., Vol. 3, p. 656, ¶ 5.

On October 10, 2013, a new attorney made an appearance on Sondra’s behalf. Supp. R., Vol. 1, p. 28 - 29.

On the morning of October 10, 2013, Sondra recorded a conveyance of her interest in Golden Eagle Drive to her boyfriend/advisor Al LaPeter (LaPeter) for a cash payment of \$100.00 and some purported oral agreement between Sondra and LaPeter that LaPeter would step up and take on the debt. R., Vol. 4, p. 768, ¶ 24; Aug. R., Supp. Aff. Robert Kantor & Exhibit; R., Vol. 3, p. 656, ¶ 5. (As the Court noted in its November 23<sup>rd</sup> e-mail the claim that LaPeter took on any debt was nonsense as he was not obligated to Bank of America to make any payments). R., Vol. 4, p. 792. Sondra conveyed her interest in Golden Eagle Drive to LaPeter because she had “concerns” regarding the potential loan modification and because Robert would not cooperate with a short sale. R., Vol. 4, p. 768, ¶ 25. Sondra did not want to deal with the loan modification so she deeded her interest to LaPeter and he could “deal with it”. R., Vol. 4, p. 768, ¶ 25. Sondra also suggested that

LaPeter could assist Robert in the loan modification process. R., Vol. 4, p. 768, ¶ 24.

Sondra's September 12th stipulation and the District Court's October 16, 2013 Order that incorporated the terms of that stipulation into the Order prohibited Sondra or her representatives from contacting Bank of America. R., Vol. 3, p. 659 - 660. The stipulation and Order also prohibited Sondra from attempting a short sale of Golden Eagle Drive. Id. By conveying her interest to LaPeter, LaPeter could contact Bank of America and through his contact with Bank of America LaPeter could guarantee there would be no loan modification. Also, as a co-owner of the property LaPeter could file his own separate action against Robert seeking occupation of the property and a judicial partition and sale of Golden Eagle Drive. On November 18, 2013, LaPeter through his counsel sent Robert a demand letter that LaPeter be given unqualified access to Golden Eagle Drive. R., Vol. 4, p. 739, ¶ 12, R. Vol. 4, p. 750. On November 21, 2013 Judge Elgee signed a TRO in Blaine County, Idaho case number CV-2013-765 that granted Robert sole possession of Golden Eagle Drive and prevented LaPeter and Sondra from entering onto Golden Eagle Drive. On December 12, 2013, LaPeter filed a Counterclaim in Blaine County, Idaho, case number CV-2013-765 against Robert seeking a judicial partition and sale of Golden Eagle Drive.

Sondra knew what she was accomplishing by transferring her interest in Golden Eagle Drive to LaPeter. LaPeter was not a party to the lawsuit and as such he was beyond the authority of the District Court. (Sondra's counsel told the District Court in chambers that the District Court could not get at LaPeter and that the District Court should not threaten LaPeter because LaPeter was not

a party to the lawsuit.) Tr., Vol. 1, p. 212, ll. 6 - 9. Through LaPeter Sondra could frustrate the stipulation. LaPeter could contact Bank of America and not be subject to any sanctions from the District Court. By contacting Bank of America LaPeter could thwart a loan modification. LaPeter could further frustrate the stipulation by forcing a sale of Golden Eagle Drive, something Sondra was prohibited from doing by stipulation and Order.

On October 16, 2013, the District Court entered an Order that incorporated the terms of the parties' September 12, 2013, stipulation into the Order. R., Vol. 3, p. 659 -660.

On October 17, 2013, Sondra filed a Motion with the Magistrate Court whom presided over the parties' divorce case asking the Magistrate Court to incorporate the PSA into a Supplemental Judgment. R., Vol. 4, p. 816 - 817. The reason Sondra filed her Motion to Incorporate became very apparent later on in the case. Sondra used her filing before the Magistrate Court as a reason to end the case before the District Court. R., Vol. 5, p. 934 - 938 (Sondra's Motion to Dismiss filed on December 23, 2013). The Magistrate Court did enter a Supplemental Judgment incorporating the parties' PSA into the Supplemental Judgment which was made effective nunc pro tunc to October 18, 2013. R., Vol. 5, p. 935, ¶ 1. Sondra argued that by virtue of the entry of the Supplemental Judgment in the divorce case, the District Court had lost jurisdiction of the issues before it and the District Court was required to dismiss the pending lawsuit. R., Vol. 5, p. 934-938.

A little more than one (1) month after entering into the September 12, 2013 stipulation Sondra had:

- a) Obtained new counsel;
- b) Filed a Motion to Incorporate the PSA into a Supplemental Judgment in an attempt to divest the District Court of its jurisdiction; and
- c) Conveyed her interest in the real property at the center of this case to a third party who was beyond the authority of the District Court.

On November 20, 2013, the District Court ordered Sondra to use her best efforts to obtain a quitclaim deed from LaPeter conveying Sondra's interest in Golden Eagle Drive back to her. R., Vol. 4, p. 751-754. The District Court ordered that it was maintaining jurisdiction over the Golden Eagle Drive property and the Bank of America loan secured by the real property as a way of accommodating the "clear contractual obligations" of Robert and Sondra. R., Vol. 4, p. 752, ¶ 2. The District Court reiterated that Robert was allowed to pursue a principal loan reduction of the Bank of America loan. R., Vol. 4, p. 752, ¶ 4.

LaPeter refused to transfer Sondra's interest back to her. R., Vol. 4, p. 738, ¶ 10 & p. 749. Robert filed a Motion for Civil Contempt Sanctions related to Sondra deeding her interest to LaPeter. R., Vol. 4, p. 733 - 750. The District Court responded to Robert's Contempt filing by sending two e-mails to Robert and Sondra's counsel. The first e-mail was on November 20th and the second e-mail was sent on November 23rd. R., Vol. 4, p. 755 - 757; R. Vol. 4, p. 792 - 793. In those e-mails the District Court set forth the factual background and noted that Sondra's action in deeding her interest in Golden Eagle Drive to her boyfriend frustrated the parties' stipulation that

Robert be allowed to pursue a loan modification. The District Court further noted that Sondra was responsible for placing herself in the situation and that if Sondra could not remedy the situation brought about by her conduct the District Court would dismiss her Counterclaim.

On December 10, 2013, the District Court entered an Order Regarding Proposed Imposition of Sanctions. R., Vol. 4, p. 907 - 910. The District Court ordered Sondra to obtain a quitclaim deed from LaPeter to her conveying LaPeter's interest in Golden Eagle Drive back to Sondra within three (3) days of the Magistrate Court's decision on whether it was going to enter a Supplemental Judgment in the divorce case. R., Vol. 4, p. 908, ¶ 3. Sondra did not comply with this Order. R., Vol. 5, p. 1031, ¶ 2 - 3.

On January 23, 2014, the District Court issued a Memorandum Order Dismissing Sondra's Counterclaim. R., Vol. 5, p. 1044 - 1050. The Court dismissed Sondra's Answer and Counterclaim for two reasons:

- 1) As a sanction for Sondra failing to abide by the District Court's December 10, 2013, Order requiring her to obtain her interest in Golden Eagle Drive back from LaPeter; and
- 2) Sondra was requesting the dismissal. R., Vol. 5, p. 1047.

Contrary to Sondra's claim, the District Court did not dismiss the case on the grounds sought by Sondra, i.e. lack of subject matter jurisdiction. Rather the District Court dismissed the Counterclaim because Sondra wanted the Counterclaim dismissed, the District Court was not sure

if it had jurisdiction, and the District Court believed that the Magistrate Court had far better remedies for dealing with the real property in question. R., Vol. 5, p. 1047 - 1048.

Judgment was entered on January 23, 2014. R., Vol. 5, p. 1051 - 1052. Sondra filed a Notice of Appeal from the Judgment.

On June 12, 2014, the District Court granted in part Robert's request for attorney fees and costs. Supp. R., Vol. 1, p. 131 - 133. Robert filed a Notice of Cross Appeal from the Attorney Fee Order.

#### IV.

#### ISSUES ON APPEAL

1. Did the District Court maintain subject matter jurisdiction of this lawsuit after the Magistrate Court entered a Supplemental Judgment in the divorce case.
2. Did the Magistrate Court have subject matter jurisdiction to enter the Supplemental Judgment.
3. Was the District Court's use of its authority in imposing the sanction of dismissing Sondra's Counterclaim an abuse of discretion.
4. Did the District Court commit error in granting summary judgment in favor of Robert and against Sondra.
5. Did the District Court's dismissal violate Sondra's right to a jury trial.

### ISSUE ON CROSS APPEAL

Did the District Court commit error by not granting Robert all of his costs and fees as mandated by the parties' PSA.

V.

### ATTORNEY FEES ON APPEAL

Robert requests an award of his attorney fees and costs on appeal pursuant to paragraph 28.03 (sic) of the PSA.

VI.

### ARGUMENT

#### A. Re-Write of Contract

Sondra argues that the District Court rewrote the parties' PSA. Sondra wants this Court to ignore the September 12, 2013 stipulation and engage in a fact finding process.

Sondra's Amended Answer and Counterclaim sought injunctive relief against Robert relating to a loan modification. R., Vol. 3, p. 572, Prayer ¶ 2. She filed a formal Motion for Preliminary Injunction and a hearing was held on her request. Rather than have the District Court issue a decision on one of her Counterclaim demands and her Motion for Preliminary Injunction Sondra chose to resolve the issue by way of a stipulation.

"MR. LUDWIG: We have a stipulation to put on the record, Your Honor.

THE COURT: Very well.

MR. LUDWIG: And we would ask that the reporter—do you want to just have a transcript of this piece of the proceeding? Did you want to get a copy of that now?

MR. WILLIAMS: Yeah, if we could just go ahead and arrange for that.

THE COURT: Very, well.

MR. LUDWIG: You'll preserve the rest of it, I assume.

So both parties are going to withdraw their motions for preliminary injunction and agree to not refile them between now and the date of trial, which is in January, I believe. Each party will bear their own costs and fees incurred in this proceeding.

Sondra Kantor, or her representative that she has control of, will not contact the B of A about this loan modification or short sale process between now and trial. The short sale will not be pursued between now and trial. And the loan modification will be undertaken as diligently as possible with B of A by Robert Kantor between now and trial...”

Tr., Vol. 1, p. 173, l. 15 - p. 174, l. 13.

The District Court made sure that Sondra knew what the terms of the stipulation were and that she was agreeing to be bound by those terms.

“THE COURT: Ms. Kantor, let me ask you those same questions.

Have you been able to hear the agreement placed on the record by counsel?

SONDRA KANTOR: Yes.

THE COURT: And do you wish to be bound by that as of now?



SONDRA KANTOR: Yes.

THE COURT: That means you can't – once you leave this room, if I accept it, you can't add anything to it or take anything from it, this is your complete agreement. Do you understand that?

SONDRA KANTOR: Yes.

THE COURT: And do you give Mr. Williams authority to enter into that stipulation as of right now?

SONDRA KANTOR: Yes, I do.

THE COURT: And do you so stipulate, Mr. Williams?

MR. WILLIAMS: Yes.

THE COURT: And, Mr. Ludwig?

MR. LUDWIG: Yes, we're agreeable.

THE COURT: I'll accept that as a binding stipulation, and if you would prepare the order, I'll sign it.

MR. LUDWIG: Okay. Thank you, Your Honor. Thanks for your time."

Tr., Vol. 1, p. 176, l. 24 - p. 177, l. 25.

Stipulations for settlement of litigation and adverse claims are regarded with favor and will be enforced unless good cause to the contrary is shown. *Young Elec. Sign Co. v. State ex rel. Winder*, 135 Idaho 804, 808, 25 P.3d 117, 121 (2001). An agreement entered into in good faith in order to settle adverse claims is binding upon the parties and is enforceable either at law or in equity.

Id. A compromise agreement to settle a dispute, when validly entered into, supersedes all prior claims and defenses. Id. A stipulation is a contract. *Straub v. Smith*, 145 Idaho 65, 69, 175 P.3d 754, 758 (2007). The stipulation that was entered into between Robert and Sondra resolved the injunctive relief claims and motions and it was a contract between Sondra and Robert. The District Court did not re-write a term of the PSA, it was Robert and Sondra who modified a term of the PSA by their stipulation. A contract may be modified by mutual consent of the parties, and the modification may be by oral agreement even though the contract is in writing. *Ore-Ida Potato Prods. v. Larsen*, 83 Idaho 290, 293, 362 P.2d 384, 387 (1961). The terms of a contract may be modified by way of a stipulation placed upon the record in a court case. *First Sec. Ban, N.A. v. Hansen*, 107 Idaho 472, 476, 690 P.2d 927, 931 (1984). The parties modified the PSA in open court by stipulating the short sale would not occur and that Robert could pursue a loan modification.

#### B. Court's Authority

Sondra contests the District Court's authority to dismiss her Counterclaim.

"Every court has power:

1. To preserve and enforce order in its immediate presence.
2. To enforce order in the proceedings before it or before a person or persons empowered to conduct a judicial investigation under its authority.
3. To provide for the orderly conduct of proceedings before it or its officers.
4. To compel obedience to its judgments, orders and process, and to the orders of a

judge out of court in an action or proceeding pending therein.

5. To control, in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto.
6. To compel the attendance of persons to testify in an action or proceeding pending therein, in the cases and manner provided in this code.
7. To administer oaths in an action or proceeding pending therein, and in all other cases where it may be necessary in the exercise of its powers and duties.
8. To amend and control its process and orders, so as to make them conformable to law and justice.”

Idaho Code §1-1603.

This Court has stated that dismissal of an action is an appropriate means of a court enforcing its orders. *Greenhow v. Whitehead's*, 67 Idaho 262, 175 P.2d 1007 (1946). In addition, this Court has noted that trial courts have an inherent authority to assess sanctions for bad faith conduct against all parties appearing before it. *State v. Rogers*, 143 Idaho 320, 322, 144 P.3d 25, 27 (2006). For purposes of imposing sanctions, a party acts in bad faith when it willfully conducts itself improperly or acts with an improper purpose. *Id.*

It is in the trial court’s discretion to determine whether to impose a sanction. *Id.* This Court will not overturn the trial court’s determination unless the trial court clearly abused its discretion.

Id. In reviewing an exercise of discretion, this Court determines whether the trial court:

1. Correctly perceived the issue as one of discretion;
2. Acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and
3. Reached its decision by an exercise of reason.

If all three factors exist, the district court's ruling is beyond purview of this Court. Id.

The District Court recognized that the imposition of a sanction of dismissal, with or without prejudice, was in its discretion. R., Vol. 5, p. 908, ¶ 4.

Sondra acted in bad faith when she conveyed her interest in Golden Eagle Drive to LaPeter. She attempted to divest the District Court of its ability to control the case before it. Golden Eagle Drive and the Bank of America loan were central to the case and the parties' stipulation. Sondra's conveyance had far reaching ramifications.

1. She intentionally placed her portion of the asset beyond the control of the District Court;
2. LaPeter as co-owner of Golden Eagle Drive began a legal campaign against Robert by seeking possession of the real property and he sought to have the property sold in a separate court action;
3. Sondra's conveyance became the focal point of the suit costing the parties' thousands of dollars in legal fees and costs. Supp. R., Vol. 1, p. 51 - 60 (Memorandum of

Fees); and

4. At the time of her conveyance Bank of America was requiring a deed from her to complete its review and by conveying the property to LaPeter she could not convey anything to Robert relating to Golden Eagle Drive.

This Court has recognized the inherent authority trial courts have to sanction bad faith actions of a party. If a trial court has the discretion to dismiss a case for discovery violations (I.R.C.P. 37(b)(2)(B)) surely this case justifies the discretionary use of the Court's inherent authority to dismiss Sondra's Counterclaim.

The District Court exercised reason in reaching its decision. The District Court's reasoning is found at a number of different places in the record. In its November 20, 2013 e-mail to counsel the District Court put into context the fact that Bank of America had already walked away from a second deed of trust that secured a substantial debt against the home. R., Vol. 4, p. 755; See also, R., Vol. 4, p. 904 (Bank of America correspondence forgiving \$999,145.33 of Home Equity Line of Credit). The District Court recognized that Sondra's conveyance of her interest in Golden Eagle Drive to her friend/confidant LaPeter, was frustrating both the provision in the PSA which required her and Robert to sell the property, but more importantly it frustrated Robert's ability to lower the debt against the home and then sell the home. R., Vol. 4, p. 755. The District Court noted that LaPeter (whom was represented by Sondra's attorney) was demanding to inspect Golden Eagle Drive, that LaPeter wanted unqualified access to the property, and that LaPeter intended on using

the property in accordance with his rights as a property owner. R., Vol. 4, p. 756. The District Court further commented on how Sondra's counsel knew the District Court was powerless to hold LaPeter in contempt and that through LaPeter, Sondra had a built-in defense to a contempt case as well. R., Vol. 4, p. 756. The District Court then warned Sondra that it had the power to sanction her actions and it would use its power to sanction her by dismissing her Counterclaim if she was unable to get her interest in Golden Eagle Drive back from LaPeter. Id.

In its November 23, 2013 e-mail to counsel, the District Court noted that prior to Mr. Anderson's appearance in the case Sondra had acquiesced to the loan modification. R., Vol. 4, p. 792-793. The District Court noted that a loan modification could have great financial value to the parties. Id. The District Court went on to note that when it first learned of Sondra's conveyance "the Court's first reaction was that she was attempting to put the house beyond the Court's (and Bob Kantor's) ability to do anything with it, and more importantly, do anything with the debt, (including, most likely, even seeking a short sale.) That suspicion appears to be confirmed. It is clear Sondra wants a short sale, so apparently the plan is to try to push for that, whereby Mr. LaPeter would presumably tender a quitclaim deed in order to accomplish that goal, when and if those two decided it was convenient or advisable to do so." Id. The District Court described Sondra's actions as "thumbing her nose at the court" and "ignoring her contract obligations". Id. Finally, LaPeter's "threats to exercise his rights as a co-tenant" cemented the District Court's resolve to dismiss Sondra's Counterclaim unless she obtained her interest in Golden Eagle Drive back from LaPeter.

Id.

In a telephonic status conference held on December 10, 2013 the District Court noted that Sondra's pleadings kept pushing for a sale of the property. Tr., Vol. 1, p. 251, l. 24 - p. 252, l. 4; See also, R., Vol. 5, p. 856 - 906 (Sondra's Affidavit and Exhibits along with Sievers and August's Affidavits suggesting there is a buyer for the home). The District Court further noted that before any short sale could occur Sondra would have to get her interest in the property back from LaPeter. Tr., Vol. 1, p. 252, ll. 4 - 7. What the District Court discerned was that Sondra was saying "I can get a quitclaim deed when and if somebody can make the property available for sale on the terms that I like. I can get a quitclaim deed from Mr. LaPeter when I want to sell and when it's going to work to me or in my benefit or in my favor on my terms." Tr., Vol. 1, p. 252, ll. 10 - 14. The District Court stated it had not written any contract for the parties and the District Court commented that if a sale were to occur pursuant to the PSA Sondra would have to get a deed from LaPeter. Tr., Vol. 1, p. 253, l. 24 - p. 254, l. 12. The District Court noted it was not using its contempt power, instead the District Court compared its sanction to a sanction given a party who refuses to produce records or answer discovery. Tr., Vol. 1, p. 254, l. 18 - p. 255, l. 13. (Sondra is incorrect that the District Court's use of the sanction was a contempt action. The District Court was very clear it was not using its contempt power). Sondra deliberately moved title of the property in issue over to a third party and she did so to frustrate the process. Tr., Vol. 1, p. 255, ll. 14 -17. The District Court had warned Sondra three times and the choice of the sanction was his choice to make. Tr., Vol. 1, p. 256, ll. 2 -

16. The District Court then noted that if LaPeter did not deed the property back to Sondra within three days of the Magistrate Court's ruling a sanction would be imposed of dismissal of her claim. Tr., Vol. 1, p. 263, ll. 10 - 21.

After the telephonic status conference the District Court issued its Order Regarding Proposed Imposition of Sanctions. R., Vol. 5, p. 907 - 910. The District Court made clear to Sondra that if she did not comply with this Order and obtain a deed from LaPeter within three days of the Magistrate Court's ruling her claims would be dismissed. R., Vol. 5, p. 908, ¶ 3.

Sondra argues that at the time of the entry of the sanctions, the District Court knew that a conveyance from LaPeter to Sondra was not needed for the loan modification. Her citation to the record does not show that the District Court made any such acknowledgment. The citation relates mostly to her counsel's comments and to her own affidavit. Tr., Vol. 1, p. 313, ll. 2-22; R., Vol.5., p. 987, ¶ 9.

The District Court exercised extreme patience and it gave Sondra ample time to comply with its Orders and attempt to undo some of the damage she had done by conveying her interest to LaPeter. The District Court's decision to dismiss Sondra's Counterclaim was based on reason.

### C. Right to Jury Trial

Sondra argues that the District Court's sanction deprives her of her constitutional right to a trial by jury. The District Court commented during oral argument on Sondra's Motion to Dismiss that it was going to dismiss the case and the parties could take their disputes up with the Magistrate



Court in the divorce case. Tr., Vol. 5, p. 282, l. 20 - p. 283, l. 4. In its Order Dismissing Sondra's Counterclaim the District Court intended for the parties to bring their claims before the Magistrate Court in the divorce action and because an action before the Magistrate Court was a divorce action, there would be no right to a jury trial. Sondra was precluded from bringing any claims in District Court whether she requested a jury trial or a court trial and as such the District Court's sanction was with prejudice because Sondra could no longer avail herself of the jurisdiction of the District Court. R., Vol. 5, p. 1047 - 1048. The District Court did not deprive Sondra of her right to a jury trial, Sondra's conduct resulted in her Counterclaim being dismissed with prejudice as to those claims she wanted to bring in District Court.

Sondra's initial Answer and Counterclaim was filed on November 21, 2012. R., Vol. 1, p. 76 - 86. Sondra did not demand a jury trial as required by the Idaho Rules of Civil Procedure and her failure to do so constituted a waiver of her right to a jury. I.R.C.P. 38(b) and 38(d). Her Amended Answer and Counterclaim did not act as a revocation of her initial waiver of the jury. I.R.C.P. 38(d).

#### D. Court's Jurisdiction

The entry of a Supplemental Judgment in Magistrate Court which incorporated the terms of the parties' PSA into the Supplemental Judgment did not divest the District Court of its jurisdiction.

This case was filed long before the Magistrate Court entered its Supplemental Judgment in the divorce case. The litigation involved claims for damages and equitable relief. Each party sought

to enforce the PSA as the PSA had never been merged into a Judgment. When the parties do not incorporate the terms of their settlement agreement into a decree of divorce, the settlement agreement is not superceded by the decree but stands independent thereof and the obligations imposed under the agreement are not those imposed by the decree but by contract. *Spencer-Steed v. Spencer*, 115 Idaho 338, 344, 766 P.2d 1219, 1225 (1988). Enforcement of such an agreement is through a breach of contract action. *Id.* Once a court has obtained jurisdiction of an action on a contract, its jurisdiction extends to all issues arising out of or connected with the contract, or relating to or depending upon it. *Murphy v. Russell*, 8 Idaho 151, 67 P. 427 (1901).

The parties chose to enforce their rights and compel the other party to fulfill their obligations under the PSA by filing claims in District Court. The District Court had jurisdiction of the case when it started and it did not lose that jurisdiction when the Magistrate Court entered a Supplemental Judgment nunc pro tunc to October 18, 2013. If the District Court did lose its jurisdiction, what court would have jurisdiction over causes of action that arose prior to the effective date of the Supplemental Judgment? The Magistrate Court does not have jurisdiction over claims that arose prior to the effective date of the Supplemental Judgment. Sondra's argument makes no sense.

The cases Sondra cites supports Robert's position that the District Court did not lose jurisdiction over the controversy before it. This Court has held that jurisdiction continues for the duration of an action or until extinguished by some event, once it has been properly attained. *McHugh v. McHugh*, 115 Idaho 198, 199, 766 P.2d 133, 134 (1988) citing *Ward v. Lupinacci*, 111

Idaho 40, 720 P.2d 223 (Ct. App. 1986). In both the *McHugh* case and the *Ward* case the holding was that the trial court maintained jurisdiction over the actions that were before them. In *Bagley v. Thomason*, 155 Idaho 193, 307 P.3d 1219 (2013) this Court held that the trial court had subject matter jurisdiction over quiet title actions and over the issue of the award of attorney fees even after an appeal had been filed. *Bagley*, 155 Idaho 193 at 196 - 197. The Supplemental Judgment could not divest the District Court of its jurisdiction over claims which arose prior to the effective date of the Supplemental Judgment. The District Court had the authority to move forward with the case before it and enforce its Orders and the stipulation that constituted part of the ongoing lawsuit.

When addressing Sondra's Motion to Dismiss at the trial court level Robert argued that the Magistrate Court did not have the authority (subject matter jurisdiction) to enter the Supplemental Judgment. Tr., Vol. 1, p. 278, l. 6 - p. 280, l. 3.

The parties' Judgment of Divorce was entered on April 30, 2012. R., Vol. 1, p. 26 - 27. The Judgment of Divorce did not provide any language that the Magistrate Court was retaining jurisdiction over the parties. Sondra did not file her Motion to Incorporate with the Magistrate Court until October 17, 2013. R., Vol. 4, p. 816 - 817. The Magistrate Court did not have the jurisdiction to enter any Supplemental Judgment because the Judgment of Divorce was final and the divorce case was over.

The entry of a decree that becomes final is res judicata as to all issues that were litigated and to all issues which could have been litigated. *Compton v. Compton*, 101 Idaho 328, 333, 612 P.2d

1175, 1180 (1980). Once a judgment is final a court is without jurisdiction to amend or vacate the judgment. *Inland Group of Companies v. Obendorff*, 131 Idaho 473, 475, 959 P.2d 454, 456 (1998).

Where the parties do not incorporate the terms of their settlement agreement into a decree of divorce, the settlement agreement is not superceded by the decree but stands independent thereof and the obligations imposed under the agreement are not those imposed by the decree but by contract. *Spencer-Steed v. Spencer*, 115 Idaho 338, 344, 766 P.2d 1219, 1225 (1988). Enforcement of such an agreement is through a breach of contract action. *Id.*

Robert and Sondra's Judgment of Divorce became final upon the running of the forty two (42) day appeal period from the entry of the Judgment on April 30, 2012. Neither party appealed the Judgment of Divorce and as a result the Magistrate Court lost its jurisdiction to enter any further orders especially an entirely new Supplemental Judgment.

The Magistrate Court had no jurisdiction to merge the PSA into a Supplemental Judgment even though the terms of the PSA stated that the Magistrate Court could merge the PSA into a Supplemental Judgment. The issue of subject matter jurisdiction is so fundamental that it cannot be waived, nor can the parties consent to subject matter jurisdiction. *State v. Urrabazo*, 150 Idaho 158, 162-163, 244 P.3d 1244, 1252-1253 (2010), over ruled on other grounds *Verska v. St. Alphonsus Reg. Med. Center*, 151 Idaho 889, 895 (2011). A court has a sua sponte duty to ensure that it has subject matter jurisdiction over a case. *Id.* Judgments and orders made without subject matter jurisdiction are void and subject to collateral attack. *Urrabazo*, 150 Idaho at 163. Estoppel has no

application where jurisdiction is at issue. *City of Eagle v. Idaho Department of Water Res.*, 150 Idaho 449, 454, 247 P.3d 1037, 1042 (2011). This Court should find that the Supplemental Judgment entered by the Magistrate Court is void for lack of subject matter jurisdiction. (It should be noted that Robert has made a direct appeal to this Court on this very issue in Blaine County case number CV-2011-525).

#### E. Summary Judgment Proceedings

Sondra argues that the District Court committed error when it determined Robert's claim was over because there was the issue of damages that remained and it is Sondra's position that Robert's damage claim should have been submitted to a jury. Robert's counsel informed the District Court at the Summary Judgment Motion that Robert was no longer seeking any monetary damages beyond a claim for fees and costs for being forced to bring the action to compel Sondra's signature on documents. Tr., Vol. 1, p. 20 l. 11 - p. 22, l. 24. Sondra admits in her brief that attorney fees and costs are collateral issues that do not go to the merits of the action. *Inland Group of Companies v. Obendorff*, 131 Idaho 473, 475, 959 P.2d 454, 456 (1998). The issue of whether Robert was the prevailing party on this claim and whether an award of fees and costs were issues for the District Court and not a jury to determine.

Sondra argues that she signed the necessary documents within two hours of the Complaint being filed. Sondra's divorce attorney was called the day before the filing of the suit and told about the pending filing. R., Vol. 1, p. 68 -69. Her attorney stated that he would tell Sondra about the

impending suit. *Id.* Up until the call to her attorney by Robert's attorney Sondra had refused to sign the necessary documents requested by Robert to facilitate the sale of Golden Eagle Drive unless Robert paid her the sum of \$10,000.00. R., Vol. 1, p. 72, ¶ 6 - 7; R., Vol. 1, p. 200, l. 23 - p. 205, l. 10. It was undisputed that the PSA required Sondra to execute any documents requested by Robert to carry out the sale of Golden Eagle Drive. R., Vol. 1, p. 71, ¶ 4. It was undisputed that after the entry of their Judgment of Divorce, Robert and Sondra entered into another contract that required Sondra to immediately sign all documents necessary for the sale of Golden Eagle Drive. Vol. 1, p. 72, ¶ 7; R., Vol. 1, p. 200, l. 23 - p. 201, l. 4. Sondra testified in her deposition that she signed the real estate documents as a result of the lawsuit being filed. R., Vol. 1, p. 205, ll. 6 - 18. In summary, Sondra was obligated by both the PSA and the post Judgment of Divorce agreement to sign the documents upon request and she refused. It was not until the filing of the suit that she signed the documents and her own testimony was that she signed because of the lawsuit being filed.

Sondra claims that after she signed the documents Robert could have ended the case. Sondra filed a multiple count Counterclaim that included claims for accounting, fraud and breach of contract on November 21, 2012. R., Vol. 1, p. 76 - 85. If Sondra wanted the litigation to end she would not have filed a multiple count Counterclaim against Robert.

The District Court did not error in finding that Robert's case was over and the issue of whether Robert was a prevailing party and entitled to fees and costs was left to the sound discretion of the District Court.

Sondra argues that the District Court committed error when it found that Robert was not required by the PSA to make anything other than the minimum payments on credit cards debts awarded to Robert. Sondra testified during her February 19, 2013 deposition the PSA did not have any language requiring Robert to pay the credit card debt in full and she testified that Robert was not delinquent on any payments. R., Vol. 1, p. 182, l. 17 - p. 183, l. 16. The PSA required Robert to pay the debts described as items B and C on the attached PDS (Property Debt Schedule). R., Vol. 1, p. 37, ¶ 17.01. Items B and C on the Property Debt Schedule were Sondra's Bank of America American Express card and her Bank of America Visa card. R., Vol. 1, p. 51, items B and C.

Sondra does not dispute that Robert was not required by the PSA to pay off the credit cards within any specified period of time. Her argument is that the District Court should have imposed a reasonable time for the payment. She cites the case of *Hull v. Giesler*, 156 Idaho 765, 777, 331 P.3d 507, 519 (2014) as authority for her argument. In *Hull* this Court held that where no time is expressed in a contract for its performance, the law implies that it shall be performed within a reasonable time and the trial court could supply a reasonable time for performance to the contract **“as long as there is evidence in the record about when the parties intended the contract to be completed.”** *Hull*, 156 Idaho at 777, emphasis added. Sondra did not provide the District Court with any evidence on the intent of the parties with respect to the payment of the credit cards. R., Vol. 1, p. 318, ¶ 3. The only evidence she submitted was that one monthly payment was missed. R., Vol. 1, p. 318, ¶ 3. Sondra did not even suggest a date for the District Court to consider. As

there was no evidence presented to the District Court regarding the intent of the parties with respect to the payment of the credit cards and as there was no evidence presented to the District Court suggesting what a reasonable repayment time period would be there was no material fact in dispute regarding Robert's breach of the PSA on that issue and Summary Judgment was appropriate. I.R.C.P. 56(c).

With respect to the issue of the password for Exclusive Resorts, that allegation was resolved by agreement of the parties. Tr., Vol. 1, p. 46, l. 10 - 11. It is appropriate for a court to enter a dismissal on an issue which has become moot. *Terhaar v. Joint Class A Sch. Dist.*, 77 Idaho 112, 289 P.2d 623 (1955). The Court recognized this issue was moot and that was the reason for the dismissal. Tr., Vol. 1, p. 52, l. 19 - 22; Tr., Vol. 2, p. 23, l. 20 - p. 24, l. 21.

Finally, Sondra argues there was a factual issue regarding the airline miles. Count One of Sondra's Counterclaim alleged that paragraph 15 of the PSA required Robert to transfer one half of the airline miles to Sondra and that Robert had failed to do so which was a breach of the PSA. R., Vol. 1, p. 81, ¶ 21. Sondra admitted that upon her execution of the parties September 26, 2012 agreement the air miles issue was resolved. R., Vol. 1, p. 185, ll. 5 - 25; R., Vol. 1, p. 204, ll. 5 - 9. The September 26, 2012 agreement states: “ AIR MILES: Robert has already transferred 200,000 miles from the AMEX Centurion to Sondra. Sondra shall receive an additional 250,000 points of the Wells Fargo account in Robert's name. As, if, and when Sondra desires to use these points, Robert shall join in a phone call with Sondra to facilitate Sondra's use of these points up to 250,000



points. This resolves all issues with regard to the division of miles/points in the agreement of the parties.” R., Vol. 1, p. 234, ¶ 3; R., Vol. 1, p. 185, ll. 16 - 25. The terms of paragraph 15 of the PSA had been modified by the September 26, 2012 agreement. Sondra made no claim that Robert breached the September 26, 2012 agreement in her Counterclaim. There is no testimony that states the Wells Fargo points referenced in the September 26, 2012 agreement are air miles or an equivalent of air miles. The District Court appropriately entered summary judgment on Robert’s behalf regarding air miles.

#### F. Attorney Fees

Sondra correctly points out that Robert requested fees pursuant to paragraph 28.03 (sic) of the PSA. She also correctly points out that when a party moves for attorney fees under a contract, the terms of the contract control. *Zenner v. Holcomb*, 147 Idaho 444, 210 P.3d 552 (2009). The PSA states that if an action is instituted to enforce any terms of the PSA then the losing party agrees to pay to the prevailing party “all costs and attorney’s fees” incurred in the action. R., Vol. 1, p. 40, ¶ 28.03 (sic). Sondra argues that the District Court erred in finding that Robert was the prevailing party.

The trial court’s determination of whom is a prevailing party for the purpose of awarding fees and costs is within the trial court’s sound discretion and will not be disturbed on appeal unless there is an abuse of discretion. *Hobson Fabricating Corp. V. SE/Z Constr., LLC*, 154 Idaho 45, 49, 294 P.3d 171, 175 (2012). The trial court shall consider the final judgment or result of the action in

relation to the relief sought by the respective parties. *Id.* Where there are claims and counterclaims between opposing parties, the prevailing party question is examined and determined from an overall view, not a claim by claim analysis. *Id.* The issue is not who succeeded on more individual claims but rather who succeeded on the main issue of the action based on the outcome of the litigation. *Id.*

Robert filed his case to force the signature of Sondra on documents needed to facilitate the sale of Golden Eagle Drive. Sondra admitted in her deposition that she was required by the parties' agreements to sign the documents. She also testified that she signed the documents because of the filing of the lawsuit. Sondra filed a number of causes of action against Robert. She does not contest the District Court's granting of summary judgment related to her fraud claim which was dismissed. On her breach of contract claims that were initially filed she lost those by way of summary judgment. Finally, with respect to her Amended Counterclaim that cause of action was dismissed based upon her bad faith conduct. There is no question that looking at the overall outcome Robert was the prevailing party.

Sondra argues there was no final judgment and therefore there can be no prevailing party. If there was not a final judgment in the case how is it that Sondra brought this appeal and stated that she had a right to bring the appeal pursuant to Idaho Appellate Rule 11(a)(1) which relates to final judgments? *R.*, Vol. 5, p. 1056, ¶ 8.

Sondra argues there was no decision on the merits but this is assertion is not accurate. There was a final determination on Robert's claim. There was a final determination on two of the three

counts brought by Sondra pursuant to her Counterclaim. Sondra's ability to bring her other causes of action in District Court were resolved permanently against her and her ability to receive monetary damages for a breach of contract were resolved against her. R., Vol. 5, p. 1048.

This Court has rejected an argument that a case must be decided on the merits in order for there to be a prevailing party entitled to attorney fees. *Allied Bail Bonds, Inc. v. County of Kootenai*, 151 Idaho 405, 414, 258 P.3d 340, 349 (2011). This Court held that the "lack of decision on the merits does not provide grounds to vacate the district court's award of attorney fees to the respondents." Id.

If the trial court recognized its decision was discretionary, and if the trial court acted within the bounds of its discretion, and it reached its decision by an exercise of reason, there is no abuse of discretion. Id.

There is no question the District Court knew the issue was one of discretion. The District Court thoroughly went through the history of the case and determined that overall Robert was the prevailing party. Tr., Vol. 2, p. 50, l. 21 - p. 62, l. 25.

The District Court was not mistaken in its finding that Robert was the prevailing party and entitled to fees.

#### H. Cross Appeal

Robert filed a cross appeal based upon the District Court's limited award of fees of \$19,334.00. The District Court awarded this amount based upon the initial Memorandum of Fees

and Costs which was filed by Robert's attorneys after entry of the summary judgment. Tr., Vol. 2, p. 61 - 62. The District Court limited the amount of fees it awarded to Robert because it believed that Robert could not have been the prevailing party on the Amended Counterclaim because those causes of action were dismissed as a sanction and therefore there could not be a prevailing party related to the Amended Counterclaim. Tr., Vol. 2, p. 62, ll. 15 - 25; p. 66, ll. 5 - 18.

The District Court committed error with respect to the amount of fees and costs awarded. Having found that Robert prevailed, the District Court should have applied the PSA terms as written which required the losing party (Sondra) to pay to the prevailing party (Robert) "all costs and attorney fees incurred in the action." R., Vol. 1, p. 40, ¶ 28.03 (sic). This Court has ruled that when a contract provides for the payment of actual fees to the prevailing party the Court must award the actual fees incurred. *Zenner v. Holcomb*, supra; *Sanders v. Bd. of Trs. Of the Mt. Home Sch. Dist. No. 193*, 156 Idaho 269, 274, 322 P.3d 1002, 1007 (2014). In other words the contract trumps Rule 54(d)(1). *Sanders*, 156 Idaho at 274. Having found Robert to be the prevailing party the District Court should have awarded Robert his actual costs and fees incurred. Instead the District Court engaged in an apportionment analysis pursuant to Idaho Rule of Civil Procedure 54(d)(1)(B) and awarded Robert a portion of his costs and fees. This Court should remand the case back to the District Court for entry of an award of Robert's actual fees and costs which were \$63,961.89. Supp. R., Vol. 1, p. 39 - 62.

The District Court was mistaken regarding needing a decision on the merits before it could

find a prevailing party on the Amended Counterclaim. As noted above, there does not have to be a decision on the merits to determine who prevailed. *Allied Bail Bonds, Inc.*, supra. The District Court was under the mistaken belief that since the Amended Counterclaim was dismissed as a sanction it could not as a matter of law determine a prevailing party on the Amended Counterclaim.

Robert was the prevailing party on the Amended Counterclaim. Sondra did not receive any of the relief she requested. Sondra is precluded from bringing her claims in District Court which precludes her from any money damage award. It would not be reasonable to find that Sondra was not the losing party on her Amended Counterclaim. It appears that the District Court's mistaken application of the law prevented it from analyzing this issue properly.

In the event this Court finds that apportionment was proper the case should still be remanded back to the District Court with instructions that a party may prevail even if there was not a final decision on the merits. The District Court could then determine if Robert prevailed on the Amended Counterclaim.

#### I. Attorney fees on Appeal

Pursuant to the terms of the PSA, paragraph 28.03 (sic) Robert should be awarded his actual fees and costs in the event he is the prevailing party on appeal.

#### VII.

#### CONCLUSION

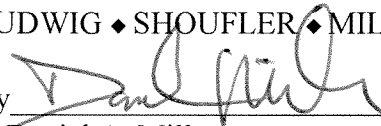
This Court should affirm the District Court's judgment with respect to its sanctions and the

summary judgment rulings. There should be a ruling that the Magistrate Court did not have the authority to enter the Supplemental Judgment because it lacked subject matter jurisdiction by the time the Motion to Incorporate was filed. Robert should be awarded his actual costs and fees incurred at the trial court level and a remand should be made for entry of the appropriate amount of fees and costs. Robert should be awarded his actual fees and costs pursuant to the PSA on appeal in the event he prevails.

DATED This 10 day of March, 2015.

LUDWIG ♦ SHOUFLER ♦ MILLER ♦ JOHNSON, LLP

By



Daniel A. Miller,

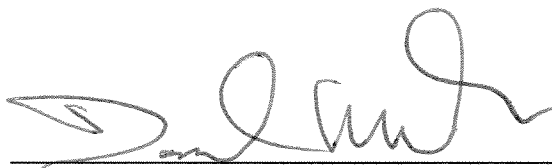
Attorney for Respondent/Cross-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 10 day of March, 2015, I caused a true and correct copy of the foregoing document to be served upon the following as indicated:

Marty R. Anderson  
THOMPSON SMITH WOOLF &  
ANDERSON, PLLC  
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Idaho Falls, Idaho 83404

☒ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Courier  
☐ Facsimile Transmission  
(208)525-5266

A handwritten signature in black ink, appearing to read "Daniel A. Miller", written over a horizontal line.

Daniel A. Miller